

APPEAL NO. 051705
FILED SEPTEMBER 1, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 17, 2005, with the record closing on June 24, 2005. The hearing officer resolved the disputed issues by deciding that the "Texas Workers' Compensation Commission [Texas Department of Insurance, Division of Workers' Compensation (Division)] does not have jurisdiction to hear this case and that if the [Division] did have jurisdiction, the compensable injury of _____, does not extend to include bowel and bladder incontinence or cellulitis of the right leg." The appellant (claimant) appealed, disputing both the jurisdiction and extent-of-injury determinations. The claimant additionally appealed evidentiary rulings made by the hearing officer and alleges he was biased. The respondent (carrier) responded, urging affirmance of the disputed issues.

DECISION

Affirmed in part and reversed and rendered in part

We first address the claimant's evidentiary objections. The claimant contends in her appeal that the hearing officer erred when he excluded some of the exhibits she offered into evidence on the basis of untimely exchange. To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. Appeals Panel Decision (APD) 91003, decided August 14, 1991. We conclude that the claimant has not shown that the hearing officer abused his discretion in determining that the evidence should be excluded because it was not timely exchanged nor has the claimant shown that the error, if any, amounted to reversible error. See 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)).

The claimant also alleges that the hearing officer was biased contending that he rushed her through her closing argument and allowed more than ample time for the medical witness presented by the carrier but refused to allow her to present detailed testimony regarding the effects of the conditions alleged. We find no support in the record for the claimant's contention that the hearing officer was motivated by or in any way demonstrated bias against the claimant. The mere fact that the hearing officer issued a decision adverse to the claimant does not, in our view, demonstrate bias but is the prerogative of the hearing officer as the sole judge of the weight and credibility of the evidence. Accordingly, we find no basis to reverse the hearing officer's decision.

It was undisputed that the claimant sustained a compensable injury on _____. Whether or not the compensable injury extended to include bowel and bladder incontinence and cellulitis and whether the Division had jurisdiction were at

issue. It was determined at a prior CCH that the compensable injury did not extend to include bilateral knee osteoarthritis or pes anserinus bursitis and that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter. Even though the impairment rating (IR) was not specified as an issue in the prior CCH, IR had to be determined to resolve the issue of first quarter SIBs entitlement. The hearing officer at the prior CCH determined that the great weight of the other medical evidence was not contrary to (Dr. V) certification of a 10% IR. These determinations were affirmed in APD 031275, decided July 3, 2003. A Plaintiff's Original Petition was in evidence reflecting that these determinations were pending before a County Court at Law in (County), Texas.

The hearing officer determined that the Division did not have jurisdiction in the present case, noting in the Background Information section that inherent in a determination of IR is a determination of what the compensable injury consists of. The hearing officer was persuaded that the pending petition for judicial review of the IR also inherently requires judicial review of the entire extent of the compensable injury, which therefore deprived the Division of jurisdiction over a subsequent extent-of-injury issue.

Section 410.307(a) provides that evidence of the extent of impairment is not limited to that presented to the Division if the court, after a hearing, finds that there is a substantial change of condition, and further provides that the court's finding of a substantial change of condition may be based only on: (1) medical evidence from the same doctor or doctor's whose testimony or opinion was presented to the Division; (2) evidence that has come to the party's knowledge since the CCH; (3) evidence that could not have been discovered earlier with due diligence by the party; and (4) evidence that would probably produce a different result if it is admitted into evidence at the trial. Section 410.307 is a rule of evidence that applies when a worker seeks judicial review of a Division decision, but it does not act as a safety valve to excuse the claimant from exhausting his administrative remedies before seeking judicial review. Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60 (Tex. 1998).

Section 410.207 provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim the Division retains jurisdiction of all other issues related to this claim. Further, Section 410.251 requires that a party must exhaust its administrative remedies and be aggrieved by a final decision of the Appeals Panel before it seeks judicial review. In the instant case, the claimant was not trying to change the IR previously determined but rather was claiming the compensable injury extended to include other conditions not previously litigated. As acknowledged in APD 040150-s, decided March 8, 2004, injuries can evolve over time and claimants may claim that additional injuries or conditions are compensable even after the expiration of the first quarter of SIBs. To hold otherwise would deprive claimants of rights specifically afforded to them under the 1989 Act.

The hearing officer's determination that the Division does not have jurisdiction in this case is wrong as a matter of law. The fact that the IR determination is pending judicial review does not deprive the Division of jurisdiction of an extent of injury

question. We reverse the determination that the Division does not have jurisdiction and render a new determination that the Division does have jurisdiction in this case.

Although the hearing officer determined that the Division did not have jurisdiction he did consider and make a determination regarding the extent of injury question before him on the merits. Conflicting evidence was presented at the CCH on the disputed issue of extent of injury. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determination that the claimant's compensable injury of _____, does not extend to include bowel and bladder incontinence or cellulitis of the right leg is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We reverse the determination that the Division does not have jurisdiction to hear this case and render a new determination that the Division does have jurisdiction to hear this case. We affirm the hearing officer's determination that the compensable injury of _____, does not extend to include bowel and bladder incontinence or cellulitis of the right leg.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Western Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge